IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5443 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHANBHAI CHOTUBHAI

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioners

MR HL JANI Learned APP for Respondent No. 1

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 15/02/2001

ORAL JUDGEMENT

Heard Mr. A.D.Shah learned advocate for the petitioners and Mr. H.L.Jani learned APP for respondent - State.

1. The petitioners have challenged the validity of the order passed by learned Additional Sessions Judge, Surat directing to admit on record the FIR (produced at Mark 19/1) in the proceedings of Sessions Case No. 223 of 1993; as Exh.110 during the course of recording of oral evidence of witness Chhotalal Babulal Jadav. The petitioners have prayed to quash the said order on the ground that document produced at Mark 19/1 in the proceedings of Sessions Case No. 223 of 1993 - the FIR cannot be said to be proved unless it is shown that said document is relevant and contents of the document are proved as provided under Section 67 of the Evidence Act.

2. The petitioners are the original accused of Sessions Case No. 223 of 1993 pending in the Court of learned Additional Sessions Judge, Surat. That the petitioners are being prosecuted for the offences made punishable under Sections 147, 148, 323, 324 read with Section 149 of the Indian Penal Code and Section 504, 302 and 114 of the Indian Penal Code.

One Mr. Rangildas Chhotubhai lodged a complaint in respect to an incident at Mahidharura Police Station on 11.3.1993 which was recorded by one PSI Mr. Ramlavat who was on duty; as an FIR. That said complaint was dictated to writer - Chhotalal Babulal Jadav by PSI Ramlavat. That on the basis of said FIR, crime was registered against the present petitioners and the petitioners were charge sheeted. The case was committed as Sessions Case and was allotted to learned Additional Sessions Judge, Surat, who framed the charge and having recorded the plea, put the petitioners to the trial. That during the trial, witness Chhotulal Babulal Jadav was examined as PW-25 in order to prove the FIR tendered on record vide Mark 19/1. That during the course of recording of oral evidence of PW-25 Chhotalal Babulal Jadav, objection was raised on behalf of accused (present petitioners) that document produced vide Mark 19/1 could not be admitted on record through oral evidence of PW-25 Chhotalal Babulal Jadav as the witness has merely taken down the dictation and has identified the handwriting and signature only. That the original informant Rangildas Chhotubhai has expired and the PSI Ramlavat to whom the original informant made the complaint has also expired. Under the circumstances, the maker of the statement and the person to whom the statement is made both being dead, the contents of the document cannot be said to be relevant either under Section 32 or Section 35 of the Evidence Act and could not be said to be proved as provided under Section 67 of the Evidence Act.

3. It appears from the record that learned Additional Sessions Judge, Surat after hearing the parties and considering the authorities cited at Bar rejected the objection raised on behalf of the accused (present petitioners) and ordered to admit the document produced vide Mark 19/1 on record and to exhibit the same as Exh.110. The said order is under challenge in the present proceedings.

4. Mr. A.D.Shah learned advocate appearing for the petitioners has referred to the provisions of Section 32(2) as well as Section 35 of the Evidence Act and has urged that complaint made by original informant deceased Rangildas to deceased PSI Ramlavat cannot be said to be relevant under either of the provisions of the above stated Sections. Not only that, PW-25 - Chhotalal Babulal Jadav has mechanically taken down the statement made by deceased Ranglidas - original informant to deceased PSI Ramlavat and as such, he could only identify his handwriting but could not establish the contents of the document. In view of the said fact, document having not been proved as prescribed under the Evidence Act, could not be admitted on record and exhibited. To support the submission Mr. Shah has referred to and relied on observations made by this Hon'ble Court in the matter of Miyana Hasan Abdulla Vs. The State, reported in 1962 GLR 107 as well as by the Hon'ble Apex Court in the matter of Ram Bihari Yadav Vs. State of Bihar and Others reported vide 1998 SCC (Cri.) 1085.

As againat that, Mr. H.L.Jani learned APP made an attempt to salvage the issue by contending that PW-25 - Chhotalal Babulal Jadav being writer was present when original informant deceased Rangildas made the statement of the complaint to deceased PSI Ramlavat and as such, document prepared in his handwriting could be said to be proved document.

5. It would be pertinent to note that under Section 154 of the Criminal Procedure Code,1973, the information relating to the commission of a cognizable offence, if given orally to an officer in charge of police station, shall be reduced to writing by him or under his direction....., and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Thus, FIR recorded by In-charge of police station becomes a document and the contents of the document has to be proved either by the person who has made the statement or to whom the statements are made. That under Section 91

of the Evidence Act, no evidence is admissible in respect to contents of document except by way of the said document (para.8 of the report in the matter of Miyana Hasan Abdulla (supra).

Under the circumstances, the contents of the FIR could not be established by oral deposition of PW-25 Chhotalal Babulal Jadav, the writer of the deceased PSI Ramlavat who has recorded the FIR as dictated by PSI Ramlavat. That PW-25 could only prove the handwriting of the document and signature of the deceased PSI Ramlavat, but the contents of the FIR could not be said to be proved through oral evidence of PW-25 - Chhotalal Babulal Jadav.

6. Furthermore, the assertion made in the document like FIR could be established by the testimony of a person who has made the said statement and which is recorded as his previous statement as provided under Section 157 of the Evidence Act or through the testimony of In-charge Officer of the police station to whom such statements are made if the maker of the statement is dead. In the instant case, the maker of the statement first informant Rangildas Chhotabhai as well as PSI Ramlavat who has recorded the statement both being dead, their testimony is not available.

7. That in the matter of Miyana Hasan Abdulla (supra), this Court has made following material and relevant observations in para.9.

> "....As observed by the Privy Council, the Evidence Act prohibits the employment of any kind of evidence not specifically authorized by the Evidence Act itself and therefore there must be a specific provision in the Evidence Act before facts can be treated as relevant and facts must also be proved as laid down in the Evidence Act....."

In the instant case, the statement made by deceased Rangildas - original informant which is recorded by way of FIR does not fall within the purview of Section 32(2) or Section 35 of the Evidence Act and as such, contents of said FIR not being relevant under the provisions of Evidence Act, is inadmissible in evidence by any other mode of proof.

8. As discussed hereinabove, the evidence of PW-25 Chhotalal Babulal Jadav, the writer in respect to contents of FIR being in the nature of hearsay is not

admissible and it could not provide the proof to prove the FIR. Similarly, in the context of the fact situation in the instance case, the contents of FIR not being relevant under any provisions of the Evidence Act, is inadmissible in evidence and thereby, learned Additional Sessions Judge, Surat ought not to have admitted the document on record by giving Exh.110.

9. In view of the above stated discussion, the order passed by learned Additional Sessions Judge, Surat while recording evidence of PW-25 Chhotalal Babulal Jadav in the proceedings of Sessions Case No. 223 of 1993 to admit the document tendered vide Mark 19/1 as Exh.110 cannot be sustained in law and as such, is quashed and set aside. Rule to that extent is made absolute.

(A.K.Trivedi,J.)

(vipul)